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In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF CALIFORNIA AND
STATE LANDS COMMISSION, PETITIONERS

v.

DEEP SEA RESEARCH, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS IN PART

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QUESTIONS PRESENTED

Under the Abandoned Shipwreck Act of 1987 (ASA), 43 U.S.C. 2101 *et seq.*, the United States takes title to certain abandoned shipwrecks and then transfers title to the States "in or on whose submerged lands the shipwreck is located." 43 U.S.C. 2105(c). In this case petitioner State of California intervened in an *in rem* action to assert title, under the ASA, to a shipwreck located on the State's submerged lands. The State then claimed that its Eleventh Amendment immunity divested the federal district court of jurisdiction. The questions presented are:

1. Whether a State must carry any evidentiary burden in an admiralty *in rem* proceeding to make a claim that, because it has title to a shipwreck under the provisions of the ASA, a federal district court is thereby divested of jurisdiction under the Eleventh Amendment.

2. Whether the lower courts correctly held that the vessel in question was not abandoned within the meaning of the ASA.

3. Whether the ASA preempts Section 6313(a) of the California Public Resources Code (West Supp. 1997), which confers on the State title to "all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California."

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OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. A1-A19), is reported at 102 F.3d 379. The opinion of the district court (Pet. App. A20-A58) is reported at 883 F. Supp. 1343.

JURISDICTION

The initial decision of the court of appeals was entered on July 17, 1996. An amended opinion, and a concurrent denial of a timely petition for rehearing, were entered on December 4, 1996. The petition for a writ of certiorari was filed on March 4, 1997, and was granted on June 9, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the application of the Abandoned Shipwreck Act of 1987 (ASA), 43 U.S.C. 2101 *et seq.* Under that Act, the United States asserts title to certain abandoned shipwrecks and then transfers title to those shipwrecks to the States in order to maximize cultural values, guarantee recreational access, and provide for appropriate public and private recovery of shipwrecks. See 43 U.S.C. 2103(a)(2), 2104(a).

A. The Law of Salvage and Finds

For the past three decades, as technological developments have made salvage of shipwrecks more feasible, claims involving title to and compensation for recovery of shipwrecks have typically been brought by salvors in admiralty courts under the legal doctrines of salvage and finds. Salvage is "the compensation allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of shipwreck." *The Sabine*, 101 U.S. 384, 384 (1879). "Salvageable" property includes "ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued." *Cope* v. *Vallette Dry Dock Co.*, 119 U.S. 625, 629 (1887). The law of salvage has two salutary purposes: saving lives and property, and returning salvaged property to its rightful owner. See *Mason* v. *The Blaireau*, 6 U.S. (2 Cranch) 240, 266-267 (1804). The salvor acquires a lien on the salvaged property and receives expenses and a salvage award, if three conditions are met: the salvage is necessitated by a "marine peril"; the service by the salvor is voluntarily rendered; and the salvor achieves success in whole or in part in recovering

property. See *The Sabine*, 101 U.S. at 384; 1 M. Norris, *The Law of Seamen* § 9:7 (4th ed. 1985). The salvor, however, does not acquire title. The law of salvage assumes that the property has an owner who has not abandoned it.

Under the law of finds, a finder acquires title in ownerless property—a finders, keepers principle. See 3A M. Norris, *Benedict on Admiralty* § 158, at 11-15 (7th ed. rev. 1997) (*Benedict*) ("A 'find' in maritime law differs from salvage in that in the former instance the property found has never been owned by any person. It therefore belongs to the finder."). The would-be finder must not only have come upon ownerless or abandoned property; he or she must have actual or constructive possession of the property. *Eads* v. *Brazelton*, 22 Ark. 499 (1861). If the property turns out not to be ownerless, or there is no actual or constructive possession, the finder is not entitled to exercise any ownership or possessory interest with respect to it. *Watts* v. *Ward*, 1 Or. 86 (1854).

B. The Submerged Lands Act and Conflicts Over the Ownership of Shipwrecks

Navigable waters, and the land beneath those waters, are generally held in sovereign hands for the benefit of the public. "Ownership of submerged lands—which carries with it the power to control navigation, fishing, and other public uses of water—is an essential attribute of sovereignty." *United States* v. *Alaska*, 117 S. Ct. 1888, 1892 (1997). In *United States* v. *California*, 332 U.S. 19 (1947), this Court held that the United States has paramount sovereign authority over submerged lands beneath the territorial sea. Congress exercised that authority in 1953 by granting certain submerged lands to the coastal States. See *United States* v. *Alaska*, 117 S. Ct. at 1906. Under the Submerged Lands Act (SLA), ch. 65, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, coastal States such as California

received title from the United States to "submerged lands within three miles of their coastlines," *United States* v. *Alaska*, 422 U.S. 184, 187 (1975), as well as "all natural resources" in those lands. See 43 U.S.C. 1311(a). At the same time, Congress provided in the SLA that "[t]he United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs." 43 U.S.C. 1314(a).

Although the SLA expressly gave States title to all "natural resources" in the conveyed lands, 43 U.S.C. 1311(a), the Act made no mention of non-natural resources, such as abandoned shipwrecks. In cases that arose prior to 1987, States generally argued that shipwrecks embedded in their submerged lands belonged to the State because, at common law, title to abandoned property buried in land belonged to the owner of the property, and not the finder.[1] Courts divided over whether the SLA could properly be viewed as conferring on the States the title to abandoned shipwrecks on state submerged lands.[2] Moreover, while States frequently

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[1] See, *e.g.*, *Zych* v. *Unidentified, Wrecked, and Abandoned Vessel*, 811 F. Supp. 1300, 1314 (N.D. Ill. 1992), aff'd, 19 F.3d 1136 (7th Cir.), cert. denied, 513 U.S. 961 (1994) (citing cases); *Ferguson* v. *Ray*, 77 P. 600 (Or. 1904).

[2] Compare *Subaqueous Exploration & Archaeology, Ltd.* v. *Unidentified, Wrecked and Abandoned Vessel*, 577 F. Supp. 597, 612 (D. Md. 1983) (SLA gives States power to regulate ownership and recovery of abandoned shipwrecks on submerged state lands), aff'd, 765 F.2d 139 (4th Cir. 1985), with *Cobb Coin Co.* v. *Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186, 215-216 (S.D. Fla. 1981) (SLA does not empower state to claim abandoned wrecks within three mile limit). Compare *Marx* v. *Guam*, 866 F.2d 294 (9th Cir. 1989) (holding that Guam had colorable claim to shipwrecked vessels under its local law and SLA) with *Commonwealth* v. *Maritime Underwater*

claimed ownership of shipwrecks under the SLA *and* their own state statutes, some courts found the state statutes preempted by the federal admiralty law of salvage and finds. See, *e.g.*, *Cobb Coin Co.* v. *Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981) (rejecting invocation of state statute as conflicting with admiralty law); *Commonwealth* v. *Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549 (Mass. 1988) (rejecting invocation of SLA and applying law of finds).

Conflicts inevitably arose after States began to seek ways of preserving cultural resources by claiming title to shipwrecks in their territorial waters. Groups such as treasure salvors wanted to exploit those vessels and their cargo for personal gain, and sport divers sought to ensure free access to the wrecks for both recreational and preservationist purposes. Conflicts among those interests became more numerous as the technology of underwater discovery and excavation advanced. Deep-diving submarines, remote-operated vessels, sonar, advanced metal detectors, aerial photography, and improved breathing devices aided in the location and recovery of shipwrecks, which in turn produced litigation over their ownership.[3]

Surveys, Inc., 531 N.E.2d 549 (Mass. 1988) (rejecting SLA and applying law of finds). The House Report accompanying the Abandoned Shipwreck Act noted that Congress had not specified "in the SLA whether the states also owned non-natural objects such as shipwrecks that rested on or within submerged lands," but that "notwithstanding this lack of clarity," many States had asserted title to such shipwrecks. H.R. Rep. No. 514, 100th Cong., 2d Sess. Pt. 2, at 2 (1988).

[3] See, *e.g.*, *Marx* v. *Guam*, 866 F.2d 294 (9th Cir. 1989) (conflict between Guam's claim to wrecks and explorer who was denied exploration and recovery permit); *Fitzgerald* v. *Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16 (1st Cir. 1989) (conflict between claims of salvors and Puerto Rico); *Martha's Vineyard Scuba*

C. The Abandoned Shipwreck Act of 1987

The Abandoned Shipwreck Act of 1987 (ASA) was designed to resolve "the conflicts—perceived and real—between salvors, archaeologists, the States and sports divers." 133 Cong. Rec. 36,578 (1987) (statement of Sen. Bradley). In introducing the legislation, Senator Bradley commented on the problems with the then-existing system:

> The United States is the only country in the world with a substantial number of historic shipwrecks that does not have a Federal law recognizing the importance of preserving some of these sites. There is no Federal law requiring orderly and archaeologically correct excavation when salvage does take place. Instead, a finders-keepers principle applies to all shipwrecks in our waters. While this rule makes sense in matters of ongoing maritime commerce, it is as obviously inappropriate for underwater archaeological sites as it would be for ancient ruins on land. Under the current system, Federal courts—sitting in admiralty—have substantial policymaking power, which has resulted in uneven judgments about the historical value of shipwrecks.

Id. at 7050 (statement of Sen. Bradley).

Under the ASA, the United States asserts title to each of three classes of "abandoned shipwrecks": (1) vessels

Headquarters, Inc. v. *Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir. 1987) (competing claims of salvor and discoverer of wreck); *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981) (claims of competing salvors); *Indian River Recovery Co.* v. *The China*, 645 F. Supp. 141 (D. Del. 1986) (competing claims of salvors and sport scuba divers).

embedded in the submerged lands of a State;[4] (2) vessels embedded in coralline formations protected by a State on its submerged lands;[5] and (3) vessels on the submerged lands of a State and included in, or determined eligible for inclusion in, the National Register of Historic Places. 43 U.S.C. 2105(a).[6] The term "shipwreck" is defined to include "a vessel or wreck, its cargo, and other contents," 43 U.S.C. 2102(d), and "submerged lands" are those "lands beneath navigable waters" within the meaning of the SLA. 43 U.S.C. 2102(f). The title of the United States to any abandoned shipwreck that is asserted under 43 U.S.C. 2105(a) is, in turn, transferred by the ASA to the States "in or on whose submerged lands the shipwreck is located." 43 U.S.C. 2105(c).[7] Subsection

[4] This provision corresponds to the common law doctrine that an owner of land is entitled to whatever he or she finds buried in it. See *Zych* v. *Unidentified, Wrecked and Abandoned Vessel*, 941 F.2d 525, 529 (7th Cir. 1991); *Jupiter Wreck, Inc.* v. *Unidentified, Wrecked and Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1386 (S.D. Fla. 1988); *Chance* v. *Certain Artifacts Found and Salvaged from The Nashville*, 606 F. Supp. 801, 805 (S.D. Ga. 1984), aff'd, 775 F.2d 302 (11th Cir. 1985); *Klein* v. *Unidentified, Wrecked and Abandoned Sailing Vessel*, 568 F. Supp. 1562, 1565-1566 (S.D. Fla. 1983), aff'd, 758 F.2d 1511 (11th Cir. 1985). The House Report accompanying the ASA described it as "consistent with the recognized exception from the law of finds for shipwrecks embedded in submerged lands of a state." H.R. Rep. No. 514, *supra*, Pt. 2, at 7 (citing *Chance*, *supra*).

[5] The term "embedded" is defined as "firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to * * * gain access to the shipwreck, its cargo, and any part thereof." 43 U.S.C. 2102(a).

[6] The Register is maintained by the Department of the Interior, as provided for by the National Historic Preservation Act, 16 U.S.C. 470a.

[7] The House Report states that "[t]he transfer of title takes place immediately upon enactment of the Act and simultaneously with the U.S. assertion of title under [43 U.S.C. 2105(a)]." H.R. Rep. No. 514, *supra*, Pt. 2, at 7.

(e) of 43 U.S.C. 2105, however, provides that that Section shall not affect any right reserved by the United States under, *inter alia*, 43 U.S.C. 1314, the provision of the Submerged Lands Act that preserves the United States' rights with respect to navigation and commerce, and 33 U.S.C. 414 and 415, the provisions of the Rivers and Harbors Appropriations Act of 1899 that concern the removal of sunken vessels obstructing navigation. See H.R. Rep. No. 514, *supra*, Pt. 2, at 8.[8]

The ASA provides that "[t]he public shall be given adequate notice of the location of any shipwreck to which title is asserted" under 43 U.S.C. 2105(a). See 43 U.S.C. 2105(b). Moreover, for shipwrecks on (as distinguished from embedded in) the submerged lands of a State, the Secretary of the Interior, "after consultation with the appropriate State Historic Preservation Officer," must make a written determination whether "an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places." 43 U.S.C. 2105(b).

The Act declares the policy of Congress that States that have taken title to abandoned shipwrecks shall develop policies to protect natural resources and habitat areas; guarantee recreational exploration of shipwreck sites; and allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and sites. 43 U.S.C. 2103(a); see also 43 U.S.C. 2104(a). The Director of the National Park Service in the Department of the Interior is responsible for issuing guidelines to assist the States in carrying out the purposes of the Act. See 43 U.S.C. 2104(a)(4), 2104(c); see 55 Fed. Reg. 50,116, 50,132 (1990).

[8] The Act also excepts from the transfer to the States any abandoned shipwreck in or on the public lands of the United States, which remains federal property, and any abandoned shipwrecks on Indian lands, which remain the property of the Indian tribe owning such lands. 43 U.S.C. 2105(d).

Finally, the ASA provides that "[t]he law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies." 43 U.S.C. 2106(a). At the same time, the ASA "shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies." 43 U.S.C. 2106(b). Thus, while the ASA "carve[s] out a limited exception from general admiralty principles for those classes of shipwrecks to which this Act applies," "[a]ll other shipwrecks * * * remain subject to the uniform principles of admiralty law, except as may be provided in other federal law." H.R. Rep. No. 514, *supra*, Pt. 2, at 8.

D. The Proceedings Below

1. The *Brother Jonathan* is a double side-wheeled paddle steamer that sank off the coast of California near Crescent City in 1865. It is estimated that the ship went down with one-half million dollars in currency and gold; some of that gold is believed to belong to the United States.[9] Shortly after the *Brother Jonathan* sank, five San Francisco insurance companies paid claims totaling $48,490.00 for loss of the insured portion of the vessel's cargo. See Pet. App. A21; J.A. 138-139. Approximately two-thirds of the cargo was uninsured, and the vessel itself appears to have been uninsured as well. See Pet. App. A21; J.A. 145.

2. In 1991, Respondent Deep Sea Research Corporation (DSR) located the wreck. That same year, DSR

[9] The United States has filed a claim to that property. See J.A. 305-307.

brought an *in rem* action in the United States District Court for the Northern District of California seeking an award of title to the *Brother Jonathan* under the law of finds or, in the alternative, a salvage award under the law of salvage. J.A. 37-57. DSR additionally asserted a right of ownership by its purchase of subrogation interests from the insurers of the vessel's original owners. Pet. App. A22.

Petitioners and the United States intervened in the case.[10] Petitioners filed a motion to dismiss the action, contending that the State held title to the *Brother Jonathan* by virtue of the ASA and that the *in rem* action was in reality an action against the State and was barred by the Eleventh Amendment. Petitioner also claimed title under Section 6313(a) of the California Public Resources Code, which purports to vest in the State title to "all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California." See Cal. Pub. Res. Code § 6313(a) (West Supp. 1997); Pet. App. A74-A78.[11]

3. The district court rejected petitioners' argument that the State's mere assertion of a claim to the *Brother Jonathan* was sufficient to divest the court of jurisdiction. It ruled that petitioners would have to demonstrate by a preponderance of the evidence that "the vessel is abandoned and embedded in the subsurface or coralline

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[10] After petitioners intervened, claiming title to the *Brother Jonathan* by operation of the Abandoned Shipwreck Act, respondent contended that the Act did not apply and that if it did, the Act was unconstitutional. The United States intervened to defend the constitutionality of the ASA. See J.A. 7. The constitutionality of the ASA was never reached by the lower courts and is accordingly not before this Court for review.

[11] Respondent stipulated that the *Brother Jonathan* was located in state waters. Pet. App. A24.

formations of the territorial waters of the State," or in the alternative, that the vessel "is abandoned" and "eligible for listing[] in the National Register." Pet. App. A26-A27. The court reasoned that if the State met that burden, the ASA would apply, the State would have title, and the admiralty action would have to be dismissed. If the ASA (or the state statute purporting to vest title in the State) did not apply—and the State therefore did not have title—the court would not be divested of jurisdiction, and the court could proceed on the merits of respondent's claims in admiralty. *Id.* at A27.

Applying that framework, the district court denied petitioners' motion to dismiss the complaint. With respect to abandonment, the district court stated that petitioners must establish "(1) an intent by the original owner to abandon his property; and (2) physical acts carrying that intent into effect." Pet. App. A30. In the court's view, abandonment must be proved by a "clear and unmistakable affirmative act to indicate a purpose to repudiate ownership." *Ibid.* Applying that standard, the court concluded that the only evidence on the point introduced by petitioner, which consisted of the testimony of an expert historian, fell short of establishing that there had been a clear and unmistakable act of abandonment or that the *Brother Jonathan* had been abandoned due to the lapse of time or because the owner failed to undertake salvage efforts. The court also declined to rest a finding of abandonment on the lack of salvage efforts since 1865, because only recently had new technology made salvage feasible. *Id.* at A35. With respect to the cargo, although the court held that abandonment may be inferred if an owner fails to appear in the judicial proceedings, it nonetheless concluded that a finding of abandonment as to any individual items would be "premature." *Id.* at A36. The court believed that title should be determined only after

notice was published following issuance of a warrant of arrest and completion of salvage operations, which might generate additional publicity and cause additional claimants to come forward. *Ibid.*

The court went on to rule that petitioners had also failed to show that the other statutory requirements for transfer of title to the State under the ASA had been satisfied. The court found that the State had failed to demonstrate by a preponderance of the evidence that the *Brother Jonathan* was "embedded" within the meaning of the Act and that the shipwreck had been determined eligible for inclusion in the National Register of Historic Places. Pet. App. A37-A43.[12] The court also rejected petitioners' claim of title under Section 6313 of the California Public Resources Code—which purports to vest title in the State to all ships that have rested on state submerged lands for 50 years—as plainly conflicting with the ASA. Pet. App. A46.

4. The court of appeals affirmed the denial of the motion to dismiss, rejecting petitioners' contention that Eleventh Amendment immunity divested the district court of jurisdiction as soon as the State made a claim to the sunken vessel. Pet. App. A2-A19. The court of appeals deemed it "appropriate for the district court to require the State to present evidence that the ASA applied to the *Brother Jonathan*, *i.e.*, that it was abandoned and either embedded or eligible for listing in the National Register, before dismissing the case." *Id.* at A11. Otherwise, the court observed, "the State could receive immunity simply by asserting that it was entitled to it." *Ibid.* The court further reasoned that because the ASA

[12] While this lawsuit was pending in the court of appeals, the Department of the Interior listed the *Brother Jonathan* on the National Register. See 60 Fed. Reg. 47,589 (1995).

vests title to an abandoned shipwreck first in the United States, and then subsequently transfers title to the States, "a federal court may adjudicate the question of whether a wreck meets the requirements of the ASA without implicating the Eleventh Amendment." *Ibid.*

The court of appeals then ruled that the district court's finding that the State had failed to demonstrate abandonment was not clearly erroneous. Pet. App. A15-A17. The court of appeals stated that abandonment could be found on the basis of either an affirmative renunciation, or an inference from the lapse of time or failure to pursue salvage operations. *Id.* at A16-A17. But the court concluded that because the technology used to discover sunken vessels was new, a failure on the part of the owner to attempt to salvage the wreck gave rise to no inference of abandonment. *Id.* at A17. The court rejected petitioners' argument that there could be a partial abandonment of the shipwreck with respect to that portion of its cargo that was uninsured. The court believed that result would be inconsistent with both general maritime law and the intent of Congress as expressed in the ASA, because it would mean that "both the federal court and the state court would be adjudicating the fate of the *Brother Jonathan*. It is unlikely that Congress intended such a confusing and inefficient approach in adopting the ASA." *Id.* at A18.

Finally, the court of appeals upheld the district court's ruling on preemption. The court reasoned that 43 U.S.C. 2106 "makes clear that Congress intended to transfer title to the states only for shipwrecks that meet the requirements of the ASA. All other shipwrecks continue to be subject to the exclusive admiralty jurisdiction of the federal courts, as provided by Article III, section 2 of the United States Constitution." Pet. App. A8. Because Section 6313 of the California Public Resources Code pur-

ports to take title to shipwrecks that do not meet the requirements of the ASA, the court found that it was ineffective to acquire title to shipwrecks that were properly "within the exclusive admiralty jurisdiction of the federal courts." Pet. App. A8.

SUMMARY OF ARGUMENT

I. Although the Eleventh Amendment does not in plain terms apply to suits in admiralty, this Court has held that *in rem* admiralty actions that are in the nature of *in personam* suits against a State are barred by the Amendment. *Ex parte New York*, 256 U.S. 490 (1921) (*New York I*). The Eleventh Amendment does not, however, bar a federal court from adjudicating an *in rem* action in admiralty initiated by a private party for adjudication of its ownership rights to the vessel and its cargo. For centuries, the *in rem* action has been recognized as a unique feature of admiralty law. By obtaining jurisdiction over the vessel, an admiralty court may adjudicate the rights of parties as against the "whole world." *The Mary*, 13 U.S. (9 Cranch) 126, 144 (1815). The general rule has been that an *in rem* decree binds parties and nonparties alike, because of the interest in having one tribunal with exclusive jurisdiction over the vessel determine ownership of it.

That general principle applies even when a sovereign asserts ownership of a vessel or cargo. Thus, this Court has sustained the adjudication of the interests of a State in an *in rem* action when the State was not in possession of the property, see *United States* v. *Peters*, 9 U.S. (5 Cranch) 115 (1809). Similarly, although a foreign sovereign in actual possession of a vessel was historically entitled to immunity, when it is not in actual possession, the foreign sovereign must establish its ownership through

an evidentiary showing, just like any other claimant. The same principle has been applied to the United States.

This Court's decisions in *New York I* and *Ex parte New York*, 256 U.S. 503 (1921) (*New York II*) do not stand for a contrary position. The *in rem* action in *New York I* was in the nature of an *in personam* maritime tort action against the State, and thus barred by the Eleventh Amendment. *New York II* likewise was a maritime tort action for damages, and the decision rested not on Eleventh Amendment grounds, but rather on admiralty principles barring attachment of a public vessel. This case, by contrast, is an *in rem* action brought to resolve the antecedent question of who owns the vessel, as against the whole world, and the vessel is not in the actual possession of the State. Although the *Brother Jonathan* is shipwrecked and rests on the State's submerged lands, petitioners' agents apparently do not know the location of the vessel and are not in actual custody of it. Accordingly, the court below correctly required petitioner to establish its ownership of the *Brother Jonathan* by a preponderance of the evidence.

II. In passing on the State's claim of ownership, however, the court of appeals erred in its approach to determining whether a shipwreck is abandoned within the meaning of the Abandoned Shipwreck Act (ASA). Although "abandoned" is not defined in the ASA, the other statutory terms in the Act, the legislative history, and the background of admiralty law support the conclusion that abandonment may be inferred when the owner of the vessel does not come forward to establish a claim when the shipwreck is discovered and a long period of time has elapsed since the ship sank. The preservationist purposes of the ASA are best served by an interpretation of "abandoned" that recognizes the State's title in such circumstances.

The contrary ruling below has three basic flaws. First, by holding that abandonment could not be inferred here because modern technology has only recently enabled the shipwreck to be salvaged, the court has effectively required an express renunciation of title. Second, there is no support in the ASA or admiralty law for the court's holding that the *Brother Jonathan* should be treated as a unified *res*, even though respondent claims ownership of only a small portion of the ship's cargo as unabandoned. Finally, the court erred in concluding that a partial nonabandonment of the cargo must afford the entire shipwreck the same status, in order to preserve respondent's right to adjudication in federal court. As explained in point I, respondent is entitled to have title to the shipwreck adjudicated in federal court and it is fully consistent with both admiralty law and the ASA for the State thereafter to assume responsibility for any portions of the wreck found by the admiralty court to be owned by the State.

III. The preemption issue need not be reached if the State is found to have acquired title to the *Brother Jonathan* pursuant to the ASA. In any event, the court below erred in concluding that Section 7 of the ASA preempts Section 6313 of the California Public Resources Code (West Supp. 1997). Section 7(b) provides that the ASA "shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies." 43 U.S.C. 2106(b). That provision contains no express preemption of state laws. It is a savings provision, and does not address whether any federal law other than the ASA—*e.g.*, the admiralty law of salvage and finds—preempts any relevant provision of state law. The district court should resolve that preemption issue in the first instance, if that court concludes on remand that the

State did not acquire title to some or all of the shipwreck under the ASA.

ARGUMENT

I. IN AN *IN REM* ACTION BROUGHT IN ADMIRALTY TO ESTABLISH TITLE TO A VESSEL, A STATE IS NOT ENTITLED TO SOVEREIGN IMMUNITY IF THE VESSEL AT ISSUE IS NOT IN ITS ACTUAL POSSESSION

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. The terms of the Amendment do not literally extend to actions brought in admiralty, which this Court has treated as distinct from actions at law or suits in equity. See, *e.g.*, *Welch* v. *Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 473 (1987) (plurality opinion); see generally 2 J. Story, *Commentaries on the Constitution of the United States* 523-524 (3d ed. 1858).[13] Nonetheless, this Court has read some

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[13] Story's view, based on early decisions of this Court, was:

> It has been doubted, whether [the Eleventh Amendment] extends to cases of admiralty and maritime jurisdiction, where the proceeding is *in rem* and not *in personam*. There, the jurisdiction of the court is founded upon the possession of the thing; and if the state should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor. Besides, the language of the amendment is, that "the judicial power of the United States shall not be construed to extend to any suit *in law or equity*." But a suit in the admiralty is not, correctly speaking, a suit in law, or in equity; but is often spoken of in contradistinction to both.

of its cases as holding that a State enjoys immunity from suit in federal court in certain admiralty contexts. See, *e.g.*, *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982) (plurality opinion) (citing *Ex parte New York*, 256 U.S. 490 (1921)). This Court's cases do not hold, however, that a State may invoke the Eleventh Amendment in an *in rem* action brought to establish title to a ship when the State does not have actual possession of the vessel.

A. The Showing Required Of A Sovereign Asserting Ownership In An *In Rem* Action Turns On Whether The Sovereign Has Actual Possession Of The Vessel Or Its Cargo

1. An *in rem* action is a special feature of admiralty law. See generally 1 S. Friedell, *Benedict on Admiralty* § 124, at 8-15 (7th ed. rev. 1997) (describing *in rem* action as the "distinctive remedy of the admiralty" and "administered exclusively by the United States courts exercising admiralty jurisdiction"). For example, upon occurrences such as a marine mishap, a failure to pay a sailor's wages, or a marine peril giving rise to a claim for salvage, the law of admiralty recognizes a right of the claimant to bring an action directly against the vessel. See generally G. Gilmore & C. Black, *The Law of Admiralty* 35-36 (2d ed. 1975). The ability to proceed *in rem* is exclusive to the federal courts: "Admiralty's jurisdiction is 'exclusive' only as to those maritime causes of action begun and carried on as proceedings *in rem*, that is, where a vessel

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2 Story, *supra*, at 523-524 (citing *United States* v. *Bright*, 24 F. Cas. 1232 (C.C.D. Pa. 1809) (No. 14,647) (Washington, J.); *Governor of Georgia* v. *Madrazo*, 26 U.S. (1 Pet.) 110, 124 (1828); *United States* v. *Peters*, 9 U.S. (5 Cranch) 115, 140 (1809)). See also *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 293-294 (1985) (Brennan, J., dissenting) (quoting Story).

or thing is itself treated as the * * * defendant by name or description in order to enforce a lien." *Madruga* v. *Superior Court*, 346 U.S. 556, 560 (1954). See also *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 88 (1946); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1866). An *in rem* action for a maritime tort has as its main function securing damages, to be paid through judicial sale of the vessel.

The *in rem* action in this case, by contrast, was brought to resolve the antecedent question of who owns the sunken vessel located by respondent. In that type of *in rem* action, "[a]n admiralty court by seizure *in rem* acquires jurisdiction of all interests in the *res* and by decree *in rem* binds all." 1 E. Benedict, *The American Admiralty: Its Jurisdiction and Practice* § 11, at 16 (5th ed. 1925). See, *e.g.*, *Rounds* v. *Cloverport Foundry and Machine Co.*, 237 U.S. 303, 306 (1915) ("By virtue of dominion over the thing all persons interested in it are deemed to be parties to the [*in rem*] suit; the decree binds all the world and under it the property itself passes and not merely the title or interest of a personal defendant."); *The Mary*, 13 U.S. (9 Cranch) 126, 144 (1815) (Marshall, C.J.) ("The whole world, it is said, are parties in an admiralty cause; and, therefore, the whole world is bound by the decision."). The federal admiralty court's *in rem* decree awards the successful claimant a title free and unencumbered by any lien.[14]

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[14] See, *e.g.*, *Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638, 642-643 (1900) (an *in rem* decree is exclusive, although an action with respect to the vessel that does not arise in admiralty may be cognizable in state court); *The Moses Taylor*, 71 U.S. (14 Wall.) at 427 (distinguishing *in rem* decree, which "gives to the title made under its decrees validity against all the world," with the "common law process," by which "the title acquired can never be better than that possessed by the personal defendant"); *The Belcher Co.* v. *M/V Maratha Mariner*, 724 F.2d 1161,

Frankfurter and Landis explained that the foundation for this principle was recognized at the framing of the Constitution, because "[m]aritime commerce was then the jugular vein of the Thirteen States. The need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." F. Frankfurter & J. Landis, *The Business of the Supreme Court* 7 (1928) (footnote omitted). See also *The Federalist* No. 80, at 478 (A. Hamilton) (C. Rossiter ed., 1961) ("The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes."); W. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1078-1083 (1983) (discussing history of admiralty and Eleventh Amendment cases).

2. That traditional analysis is not altered when a State is a claimant in such an *in rem* proceeding. This Court has never held that a State may obtain the dismissal of an *in rem* action in federal court—which would encompass even its own claim of ownership—when the purpose behind the action is to determine title to a vessel and the State does not have actual possession of the vessel. Although occasionally cited for the proposition that the Eleventh Amendment applies in *in rem* actions,[15] *Ex*

1163-1164 (5th Cir. 1984); see generally S. Friedell & N. Healy, *An Introduction to* In Rem *Jurisdiction and Procedure in the United States*, 20 J. Mar. L. & Com. 55, 58 (1989) ("[A] judgment for the plaintiff [in an *in rem* suit] will allow the court to sell the vessel free and clear of all liens—even those that are not before the court.").

[15] See, *e.g.*, R. Fallon et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1051 (4th ed. 1996); W. Fletcher, *supra*, at 1081-1082. The contemporaneous edition of *The American Admiralty;*

parte New York, 256 U.S. 490 (1921) (*New York I*), and *Ex parte New York*, 256 U.S. 503 (1921) (*New York II*), stand for much narrower propositions: that an *in rem* suit may not proceed when it is in the nature of an *in personam* suit against the State itself or when the State is in actual possession of the vessel.

In *New York I*, privately-owned tugboats were involved in collisions that caused damage to other privately-owned vessels. The vessel owners brought an *in rem* suit against the tugboats on a theory of maritime tort: the vessels that caused the damage were liable to the injured parties. See 256 U.S. at 495. At the time of the collisions, the tugboats were under charter to the New York Superintendent of Public Works, but that charter had since expired. The owners pointed out that if decrees were entered against the tugboats, the owners would be called upon for payment even though they were strangers to the collision. They contended that the Superintendent ought to be proceeded against in the same suit for damages, in accordance with admiralty rules. The district court ordered the Superintendent to appear and stated that if he did not, it would order the attachment of state goods and chattels under his control. *Id.* at 496.

In issuing a writ of prohibition to bar the district court from exercising jurisdiction, this Court explained: "the proceedings against which prohibition is here asked have no element of a proceeding *in rem*, and are in the nature of an action *in personam* against Mr. Walsh, not indi-

however, accurately stated the Court's holding in *New York II*: "A vessel, the property of a State in its possession and control and employed for governmental uses and purposes, is exempt from process *in rem* and her public character, at least in the absence of special challenge, is established by the verified suggestion of the attorney general of the State." E. Benedict, *supra*, § 213, at 291.

vidually, but in his capacity as Superintendent of Public Works of the State of New York." 256 U.S. at 501. In the Court's view, the suit was in its nature and effect against the State, because any judgment would be executed upon state property or funds. *Id.* at 502-503. Thus, the Court held, "[i]t is not inconsistent in principle to accord to the States, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction." *Id.* at 503.

New York II also involved a maritime tort, a collision by the steam tug *Queen City* that caused a victim to drown. The decedent's administrators filed an *in rem* action to recover damages for the alleged wrongful death. The New York Attorney General "appeared specially for the purpose of questioning the jurisdiction of the court, and filed a verified suggestion of the want of such jurisdiction * * * for the reason that at all times mentioned in the libel and at present [the *Queen City*] was the absolute property of the State of New York, in its possession and control, and employed in the public service of the State for governmental uses and purposes." 256 U.S. at 508. After the district court rejected the State Attorney General's suggestion to dismiss the suit for lack of jurisdiction, this Court issued a writ of prohibition.

The Court first concluded that the verified suggestion presented by the Attorney General of New York concerning a public matter presumably within his official knowledge "ought to be accepted as sufficient evidence of the fact, at least in the absence of special challenge." 256 U.S. at 509. Having accepted the Attorney General's representations of ownership and possession, the Court put to one side the question whether an *in rem* suit brought

against property owned by a State "is not in effect a suit against the state," barred by *New York I*. 256 U.S. at 510. The Court instead relied upon a general principle, applicable in admiralty as in other settings, barring attachment of public property, including public vessels. The Court explained that, under international law, a sovereign's vessel could not be seized and subjected to admiralty process, so the same rule of comity should apply to vessels owned and operated by States, as well as by municipal corporations that are not entitled to the full sovereign immunity of States: "The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process *in rem*, applies with even greater force to exempt public property of a State used and employed for public and governmental purposes." *Id.* at 511.

In short, both *New York* cases involved maritime torts in which the injured parties were attempting to use the *in rem* form to avoid bringing an *in personam* action naming the State as a defendant. In *New York I*, the State was not in possession of the vessel and relief in the nature of damages was sought against a state officer. In *New York II*, the Court did not rest its decision on Eleventh Amendment grounds. Neither *New York* case involved an *in rem* action to determine the antecedent question of the ownership of a vessel.

Nor were the results in those cases novel. Long before the two *New York* decisions, this Court had rejected various attempts to use admiralty *in rem* process when the underlying action was essentially a suit against a State. Thus, in *Governor of Georgia* v. *Madrazo*, 26 U.S. (1 Pet.) 110, 124 (1828), the Court disallowed an effort to file an *in rem* action against the Governor of Georgia. The Court held that the district court sitting in admi-

ralty lacked *in rem* jurisdiction because the subject matter of the suit "was not in possession of the district court," but rather in the possession of the Governor on behalf of the State. *Ibid.*; see *id.* at 123. See also *Ex parte Madrazzo*, 32 U.S. (7 Pet.) 627, 632 (1833) (holding *in rem* suit improper because slaves who were the subject of the dispute and the proceeds of their sale were not in the possession of the court, and holding that the suit, which sought compensation, was in the nature of a "personal suit against the state").

By the same token, the Court had also made clear long before the two *New York* cases that the mere assertion of an interest in an *in rem* proceeding is not enough to divest the federal court of jurisdiction. In *United States* v. *Peters*, 9 U.S. (5 Cranch) 115 (1809), the Court had to resolve whether private claimants or the Commonwealth of Pennsylvania owned the proceeds of an admiralty prize sale. In explaining the parameters of Eleventh Amendment immunity, Chief Justice Marshall wrote for the Court:

> The [eleventh] amendment simply provides, that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant. In this case, the suit was not instituted against the state, or its treasurer, but against the executrices of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the

> disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged, that a mere suggestion of title in a state, to property in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.

Id. at 139. See also *United States* v. *Bright*, 24 F. Cas. 1232, 1236 (C.C.D. Pa. 1809) (No. 14,647) (Washington, J.) (holding that the Eleventh Amendment does not apply to *in rem* admiralty suits in which "the property in dispute is generally in the possession of the court," because "[a]ll the world are parties to such a suit, and of course are bound by the sentence. The state may interpose her claim and have it decided. But she cannot lie by, and, after the decree is passed, say she was a party, and therefore not bound, for want of jurisdiction in the court.").

In none of this Court's subsequent cases has a contrary position been upheld. Indeed, although *New York I* has been cited for the proposition that the Eleventh Amendment bars a suit against an unconsenting State,[16] it has more often been cited for the related proposition that a suit in the nature of an *in personam* action will be barred

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[16] See *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1122 n.7 (1996); *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 22 (1989) (plurality opinion); *id.* at 38 (Scalia, J., concurring in part and dissenting in part); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 239 n.2 (1985); *Pennhurst State School and Hosp.* v. *Halderman*, 465 U.S. 89, 99 (1984); *id.* at 141 n.18 (Stevens, J., dissenting); *Patsy* v. *Board of Regents*, 457 U.S. 496, 528 (1982) (Powell, J., dissenting); *Nevada* v. *Hall*, 440 U.S. 410, 441 n.5 (1979) (Rehnquist, J., dissenting); *Missouri* v. *Fiske*, 290 U.S. 18, 26 (1933); *The Western Maid*, 257 U.S. 419, 434 (1922).

if the proceeding is essentially against the State.[17] *New York II* has been cited for the proposition that a vessel or property in the sovereign's possession cannot be arrested in an *in rem* action.[18] In *Treasure Salvors*, this Court had no occasion to decide whether a State could invoke Eleventh Amendment immunity in an *in rem* action when the property was not in the possession of the State, because in that case the state agents had custody of the disputed artifacts. See 458 U.S. at 697 (plurality opinion) (leaving open extent to which federal court exercising *in rem* admiralty jurisdiction may adjudicate rights to property as against sovereign that did not appear and voluntarily assert claims against the *res*); *id.* at 710 & n.7 (White, J., concurring in the judgment in part and dissenting in part) (analogizing state sovereign immunity to federal and foreign sovereign immunity and declaring that "[o]nly when a vessel is not in the sovereign's possession[] is there controversy over the proper means by which the foreign government may assert its ownership").[19]

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[17] See *Welch*, 483 U.S. at 473; *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 698 (1982) (plurality opinion); *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974); *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 277 (1959); *Land* v. *Dollar*, 330 U.S. 731, 738 (1947); *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 374 (1945); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945); *Great N. Life Ins. Co.* v. *Read*, 322 U.S. 47, 51 (1944); *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292, 296 (1937); *State Highway Comm'n* v. *Utah Constr. Co.*, 278 U.S. 194, 199 (1929).

[18] See *Welch*, 483 U.S. at 489 (plurality opinion); *Treasure Salvors*, 458 U.S. at 698 (plurality opinion); *Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945); *Compania Espanola de Navegacion Maritima* v. *The Navemar*, 303 U.S. 68, 72 (1938); *The Western Maid*, 257 U.S. at 433.

[19] The court below used the term "colorable claim" to measure whether the State could properly invoke immunity under the Eleventh Amendment. We do read this Court's passing use of that phrase in *Treasure Salvors* (see 458 U.S. at 694 (plurality opinion); *id.* at 711 (White, J., concurring in the judgment in part and dissenting in part)) to require an inquiry distinct from that required by this Court's cases where, as here, a sovereign claims ownership but is not in possession of the vessel.

3. The requirement that a State must prove its claim in an admiralty *in rem* action is not dissimilar to the treatment historically given to foreign sovereigns and the United States.

a. With respect to foreign sovereigns, this Court's decisions suggest that two different levels of proof were imposed, depending on whether the vessel was in the actual possession of the foreign government or in the possession of a private party against whom the foreign government asserted ownership. In the former situation, that government was required to come forward with at least some proof of ownership in a federal admiralty court; its mere assertion of title was insufficient. See, *e.g.*, *The Pesaro*, 255 U.S. 216, 219 (1921). Where the foreign government had a certificate of title or commissioning document, such document "imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted." *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 336 (1822). And even if the libellant who had brought the *in rem* action believed "clear proof" existed that ownership was improperly obtained by the foreign sovereign, the court would not entertain such evidence "unless the fact be established beyond all reasonable doubt." *Id.* at 339-340. See also *The Schooner Exchange* v. *McFadden*, 11 U.S. (7 Cranch) 116, 147 (1812) (title to vessel under foreign sovereign control would not be questioned where it was clear the vessel was under actual possession and control of that sovereign).

By contrast, in cases in which the vessel was not in the actual possession of the foreign government, this Court imposed a more stringent evidentiary requirement on the government claiming ownership. Thus, in *Compania Espanola de Navegacion Maritima* v. *The Navemar*, 303 U.S. 68 (1938), the Court rejected the Spanish government's assertion of immunity based on a suggestion of ownership of the vessel in question. The Court upheld the district court's having undertaken an evidentiary assessment of whether the foreign sovereign possessed the vessel, and reversed the court of appeals' "mistaken" conclusion that the Spanish government's assertion of ownership must be accepted by the court at face value. *Id.* at 73-74. If the foreign sovereign opted to make a formal claim in the court, "the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner if it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged." *Ibid.*[20]

b. With respect to assertions of immunity by the United States, this Court has also required an evidentiary showing of proof of claims in *in rem* actions when United States government agents did not have actual possession of the property. In *The Davis*, 77 U.S. (10 Wall.) 15 (1869), cotton owned by the United States had been transported aboard a vessel that had confronted a marine peril. A salvor saved the cotton, and when it was delivered to its final destination, the salvor filed an *in*

[20] By contrast, when the United States filed a suggestion of immunity on behalf of the foreign sovereign, the suggestion was conclusive. See 303 U.S. at 74; *Ex parte Peru*, 318 U.S. 578 (1943). Congress has since abrogated the sovereign immunity of foreign governments in certain admiralty contexts. See 28 U.S.C. 1605(b).

rem action against the cotton for a salvage award. The Court held that a maritime lien was enforceable against the United States under the rule that "proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court." *Id.* at 20. The Court further concluded that the possession by the government "must be an actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication." *Id.* at 21. The rationale for the rule requiring actual possession was "to prevent any unseemly conflict between the court and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its possession from disturbance by virtue of judicial process." *Ibid.*; see also *The Siren*, 74 U.S. (7 Wall.) 152, 159 (1868) (the ability of a claimant to proceed *in rem* to enforce lien against the United States depends on whether the vessel was in the government's custody, "because of the exemption of the government from a direct proceeding *in rem* against the vessel whilst in its custody").[21]

[21] With respect to United States vessels, Congress enacted certain exceptions to sovereign immunity in the Public Vessels Act, ch. 428, 43 Stat. 1112, 46 U.S.C. App. 781 *et seq.*, and the Suits in Admiralty Act, ch. 95, 41 Stat. 525, 46 U.S.C. App. 741 *et seq.* The general purpose behind those statutes was to authorize *in personam* actions against the United States when public vessels were involved in maritime torts, in order to avoid tying up those vessels in *in rem* actions. As the legislative history of the Suits in Admiralty Act shows, the courts had held that vessels purchased, leased, and chartered by the United States Shipping Board to the Emergency Fleet Corporation for merchant use during World War I had been held to lack sovereign immunity. Accordingly, the statute permitted *in personam* suits but prohibited *in rem* suits. See S. Rep. No. 223, 66th Cong., 1st Sess. 2-3 (1919).

B. Petitioners Have Not Established Immunity From This *In Rem* Action

Under the foregoing principles, the district court in this *in rem* action was obliged to conduct fact-finding on whether the State was in "actual possession" of the *Brother Jonathan* before assessing whether its claim of immunity required dismissal. The purpose of the immunity rule is that a court will not interfere with the sovereign's ownership and use of the vessel when it is in the sovereign's actual possession, at least unless that possession is clearly wrongful. The threshold issue of actual possession, however, may be examined by the court. In *New York II*, for example, this Court imposed a requirement on the State's Attorney General to provide a verified submission that the vessel was owned and possessed by the State, and the Court further understood that the verified submission might be open to evidentiary challenge. See 256 U.S. at 509. Similarly, in *Treasure Salvors*, the plurality engaged in sufficient analysis of the facts to ascertain that "the State does not have even a colorable claim to the artifacts pursuant to these contracts." 458 U.S. at 694 (analyzing the provisions in the contract between Treasure Salvors and the State). The plurality's decision, therefore, rested on the fact that the state agents wrongfully possessed the artifacts. See also *The Santissima Trinidad*, 20 U.S. (7 Wheat.) at 339-340. And although the dissenters in *Treasure Salvors* disagreed with the proposition that it was appropriate to examine whether the sovereign's possession of the property was wrongful, that assessment was based on their view that sovereign immunity applied when "the property to be arrested was in the possession and ownership of the State." 458 U.S. at 708 (White, J., concurring in the

judgment in part and dissenting in part).[22] When the property is not in the sovereign's possession, the cases cited by the *Treasure Salvors* dissenters establish that judicial inquiry into the bona fides of the sovereign's ownership claim is appropriate.

Nor does it seem on the present record that petitioners can plausibly assert that it is in "actual possession" of the *Brother Jonathan*. Its agents apparently do not even know where the vessel is located. See Pet. App. A24 n.4. The fact that a shipwreck may be resting on state submerged lands is insufficient for a claim of actual

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[22] We disagree with one aspect of the court of appeals' reasoning by which it justified inquiring into petitioner's claim to ownership of the *Brother Jonathan* notwithstanding its invocation of immunity. The court asserted that, "in addressing the questions of abandonment, embeddedness, and historical significance of the wreck under the ASA, a federal court does not adjudicate the state's rights [because the] ASA does not vest title to wrecks that satisfy its requirements directly in the state. Rather, it provides that the *federal* government may assert title to such wrecks." Pet. App. A13-A14. In our view, the transfer provision of the ASA is automatic—once the statutory requisites have occurred, the transfer to the State is complete, although judicial proceedings may be required, after discovery of the shipwreck, to perfect that title. Cf. *United States* v. *A Parcel of Land, Buildings, Appurtenances, and Improvements, Known as 92 Buena Vista Avenue*, 507 U.S. 111, 126-127 (1993) (plurality opinion); *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890). The court below seemed to rely upon the statutory provision as justification for a per se rule permitting inquiry into a State's claim of title under the ASA. The court's rule, however, would also seemingly apply when the State was in actual possession of the shipwreck, through the discovery and salvage efforts of its agents. We agree that the derivative nature of the State's title reinforces the rejection of Eleventh Amendment immunity here, but absent some affirmative indication, we do not read the ASA's initial assertion of title by the United States to displace, for the States, the usual rule that immunity applies when the vessel is owned and possessed by the sovereign.

possession. In *The Davis*, the Court explained that "[t]he possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession." 77 U.S. (10 Wall.) at 21.

Once the district court determined that the requisites for its assertion of *in rem* jurisdiction had been satisfied, its jurisdiction over the *Brother Jonathan* was absolute and its final decree will be conclusive as to the whole world. There is no support in this Court's cases for a State to "opt out" of an *in rem* proceeding and then to declare that the court's *in rem* decree does not apply to it, when the State is not in actual possession of the vessel it claims to own—just as the United States has never been permitted to do so when the property is not in its actual possession. Accordingly, it was appropriate for the courts below to require petitioner to establish its ownership of the *Brother Jonathan* by the standard of proof any claimant must demonstrate in an *in rem* action: proof by a preponderance of the evidence.[23]

[23] The United States intervened in this action to defend the constitutionality of the Abandoned Shipwreck Act. The government's brief in the court of appeals took the position (Gov't C.A. Br. 16-22) that the court did not have to reach that question because respondent's *in rem* action was barred by the Eleventh Amendment. Upon a thorough reexamination of the issue in connection with the preparation of this brief, we have concluded that that position was incorrect.

II. THE COURT OF APPEALS ERRED IN ITS ASSESSMENT OF WHETHER THE *BROTHER JONATHAN* AND ITS CARGO WERE "ABANDONED"

Notwithstanding our belief that petitioner cannot invoke the Eleventh Amendment to avoid the district court's resolution of title in an *in rem* action unless the State is in actual possession of the shipwreck, we nonetheless believe that, at least on the record as it stood at the time the district court ruled on the State's motion to dismiss, the State could establish its claim to ownership of the *Brother Jonathan* under a proper construction of the ASA. Where there is no evidence that the original owner attempted to recover the vessel or come forward to claim it in the *in rem* action, the courts may properly infer abandonment under the ASA.

A. An Inference Of Abandonment Under The ASA May Be Drawn From An Absence Of Efforts To Recover Or Claim The Vessel

Congress did not expressly define the term "abandoned" in the ASA.[24] The proper construction of

[24] In regulations promulgated by the Department of the Interior, the agency entrusted with administering the ASA and in registering historic vessels (see 43 U.S.C. 2104(a), 2105(b)), the term "abandoned shipwreck" means "any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person." 55 Fed. Reg. 50,116, 50,120 (1990). In addition, the regulations provide that "[w]hen the owner of a sunken vessel is paid the full value of the vessel (such as receiving payment from an insurance underwriter) the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner." *Id.* at 50,120-50,121. Although that construction is entitled to deference, see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it does not directly answer the

that term may be ascertained, however, from other provisions of the Act, its legislative history, the background usage of that term in admiralty, and the purposes of the ASA.

1. Section 2 of the ASA, 43 U.S.C. 2101, states Congress's findings with respect to abandoned shipwrecks:

> The Congress finds that —
>
> (a) States have the responsibility for management of a broad range of living and non-living resources in State waters and submerged lands; and
>
> (b) included in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.

Accordingly, Congress contemplated that an "abandoned" shipwreck would be one that has been "deserted" and "to which the owner has relinquished ownership rights with no retention." *Ibid.* In addition, the ASA specifies that one situation in which an abandoned vessel is covered by the Act is if the vessel is "embedded." See 43 U.S.C. 2105(a). The term "embedded" is defined as "firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof." 22 U.S.C. 2102(a). The fact that a shipwreck is "embedded" is itself some evidence that it has been "abandoned," because the physical process by which a

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abandonment questions posed in this case: whether abandonment may be inferred by the passage of time and whether partial abandonment may defeat an assertion by the State to title to the abandoned vessel and cargo.

shipwreck becomes "embedded" is typically quite lengthy, thereby leading to an inference that the vessel's owner has relinquished any interest in it. See 134 Cong. Rec. 6616-6617 (1988) (statement of Rep. Bennet).

The legislative history of the ASA establishes that Congress intended for abandonment to be determined based on the surrounding circumstances when the actual intentions of the owner are not otherwise known. "The Committee notes that the term 'abandoned' does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck." H.R. Rep. No. 514, *supra*, Pt. 1, at 2. The House Report further states that "[a]bandoned shipwrecks within the scope of this Act include those which have been deserted and to which the owner has relinquished all ownership rights. Except in the case of U.S. warships or other public vessels (which require an affirmative act of abandonment), abandonment may be implied or inferred from the circumstances of the shipwreck as when an owner has never asserted any control over or otherwise indicated a claim of possession." H.R. Rep. No. 514, *supra*, Pt. 2, at 5.[25] As a general rule, then, Congress did not intend a strict standard of abandonment under the ASA. See, *e.g.*, *Fairport Int'l Exploration, Inc.* v. *The Shipwrecked Vessel Known As The Captain Lawrence*, 105 F.3d 1078, 1085 (6th Cir. 1997) ("Common sense makes readily apparent that the [ASA] did not contemplate a court's re-

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[25] See H.R. Rep. No. 514, *supra*, Pt. 2, at 13 (letter from Assistant Secretary of State expressing view that the presumption against abandonment of U.S. vessels should be accorded to sunken vessels that previously were in the non-commercial service of a foreign state).

quiring express abandonment; such explicit action is obviously rare indeed, and application of such a rule would render the ASA a virtual nullity."), petition for cert. pending, No. 96-1936.

2. The predominant admiralty law definition given to the word "abandoned" further supports a broad construction of that term in the ASA. As a general matter, if Congress adopts a term that has a certain meaning in admiralty law and does not define it differently in the words of the statute, the term should be given its admiralty law meaning. Cf. *Moskal* v. *United States*, 498 U.S. 103, 114 (1990). And where multiple definitions exist and there is some doubt as to the precise meaning that Congress may have intended to import into the legislation, it is "more appropriate to inquire which of the [admiralty] law readings of the term best accords with the overall purposes of the statute." *Id.* at 116.

The majority view has always been that the process of determining abandonment is an inferential one based on the totality of the circumstances, in which an abandonment could be inferred by "the absence of a claimant or the neglect to claim." *Russell* v. *Forty Bales Cotton*, 21 F. Cas. 42, 46 (S.D. Fla. 1872) (No. 12,154). Very few cases involve an express renunciation by an owner,[26] thereby leading courts generally to look to factors such as the passage of time, the use or non-use of property, and the failure to launch a search for the property as indicators of abandonment. See, *e.g*, *Commonwealth* v. *Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549, 552 (Mass. 1988) ("[S]ince the Wydah has rested undisturbed and undiscovered beneath the sea for nearly three centuries, it is proper to consider the wreck abandoned."); 2 T.

[26] But see *The Georgiana*, 245 F. 321 (1st Cir. 1917), where abandonment was expressly stated.

Schoenbaum, *Admiralty and Maritime Law* § 16-7, at 340 (2d ed. 1994) ("In virtually all of the treasure salvage cases involving wrecks of great antiquity, the law of finds, not salvage, is appropriate because '[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.'") (quoting *Treasure Salvors, Inc.* v. *Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978)).[27]

Admiralty courts traditionally have also drawn conclusions from who appears (and does not appear) in the admiralty proceedings to claim title to property; if no one other than the salvor appears, the property may be presumed to have been abandoned. As Justice Story wrote in *The Harrison*, 14 U.S. (1 Wheat.) 298, 299 (1816):

> Whenever a prize is brought to adjudication in the admiralty, if, upon the hearing of the cause, upon the ship's papers, and the evidence taken in preparatory, the property appears to belong to enemies, it is immediately condemned. If its national character appear doubtful, or even neutral, and no claim is interposed, the court[s] do not proceed to a final decree, but the cause is postponed, with a view to enable any person, having title, to assert it, within a reasonable time, before the court. This reasonable time has been, by the general usage of nations, fixed at a year and a day after the institution of the prize

[27] See also *Rickard* v. *Pringle*, 293 F. Supp. 981, 984 (E.D.N.Y. 1968) (ship's propeller that had been on the ocean floor for 60 years presumed abandoned); *Wiggins* v. *1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960) (derelict vessel and cargo presumed abandoned where they had remained in known location for 66 years).

proceedings; and if no claim be interposed within that period, the property is deemed to be abandoned.

See also A. Lawrence, *State Antiquity Laws and Admiralty Salvage: Protecting Our Cultural Resources*, 32 U. Miami L. Rev. 291, 294 (1977) ("In addition to drawing an inference of abandonment from prolonged inaction, admiralty has attempted a partial solution of the abandonment problem by providing a means for all known claimants of the salvaged property to be noticed and heard. If no one other than the salvor appears, abandonment may be presumed.").

3. The foregoing construction of the term "abandonment" for non-public vessels furthers the purposes of the ASA. Congress intended the Act to enable States to exercise managerial control over and acquire title to historic shipwrecks for the public's benefit: "[O]ur nation's maritime heritage * * * is best protected by states acting through their historic preservation programs consistent with federal guidance." H.R. Rep. No. 514, *supra*, Pt. 2, at 8. The ASA thus seeks to preserve historic vessels and their contents for future generations. "These irreplaceable treasures of our past should not be the exclusive domain of a few people, whether they be salvors, divers, or archaeologists. By making them the property of the States, we put them in the hands of the public institutions best able to manage them." 134 Cong. Rec. 6618 (1988) (statement of Rep. Udall). The ASA provides for historic shipwrecks to be treated like other cultural property that is to be protected for public preservation and enjoyment. That purpose is best served by a general presumption that shipwrecks are "abandoned" within the meaning of the Act when no owner has appeared to assert title to the vessel

or its cargo and a long period of time has elapsed since the shipwreck occurred.

B. The Court of Appeals Erred In Its Approach To The Abandonment Question

The court of appeals recognized the "traditional approach to abandonment which allows abandonment to be inferred on the basis of circumstantial evidence" (Pet. App. A15), but it nonetheless affirmed the district court's holding that petitioners had not established that the *Brother Jonathan* was abandoned. The court of appeals' decision rested on three propositions. First, that abandonment should not be inferred because recovery of the vessel only recently became technologically feasible. Second, that the *res*—*i.e.*, the vessel and its cargo—should not be divided into abandoned and unabandoned parts. And third, that because part of the cargo was "unabandoned" the rest of the vessel and its cargo should be assumed to be unabandoned as well. Each of those propositions is incorrect.

1. Even though the court below stated that a wreck is not abandoned unless "title is affirmatively renounced" *or* "abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners" (Pet. App. A16), it nonetheless held that "[w]hen the technology to conduct salvage operations has been developed recently, failure on the part of an owner to attempt to salvage the wreck does not give rise to an inference that the owner has abandoned title to the vessel" (*id.* at A17). The logical import of the court's holding is that all vessels sunk before modern technology created the means for their discovery and salvage will be presumptively unabandoned. That test essentially requires an express statement that the owner has relinquished all rights in the vessel and its cargo.

The Ninth Circuit's resistance to inferring abandonment constrains the States' management of historic resources and thereby undermines one of the principal purposes of the ASA. Indeed, a major impetus for enactment of the ASA was to assure protection for historic and recreational interests in light of the development of new technologies that allowed recovery of long submerged and abandoned shipwrecks. S. Rep. No. 241, 100th Cong., 1st Sess. 6 (1987). Certainly the availability of technology to discover and salvage the vessel may be a relevant factor in assessing the circumstances surrounding an alleged abandonment—*e.g.*, where the original vessel owner has manifested a continued ownership claim through some affirmative acts, but has not previously undertaken or succeeded in any actual salvage activities. But divorced from any other indication that the owner has asserted an interest, a prior inability to salvage a shipwreck as a technological matter should not defeat an inference that the vessel owner has abandoned the vessel. To the contrary, the absence of any feasible means to recover a sunken vessel would normally *reinforce* an inference that the owner had given up any prospect of doing so. Moreover, if the development of new technology prevents a finding of abandonment and passage of title to the State, yet the true owner does not come forward in the admiralty proceedings to claim the vessel, the shipwreck will remain in legal limbo without any identified owner. Such a rule would defeat the very purposes of the *in rem* proceeding: to definitively resolve the question of ownership as against the whole world.

2. The court of appeals further erred by holding that the *Brother Jonathan* and its cargo should be treated as a unified *res*. See Pet. App. A18. The court concluded that dividing the *Brother Jonathan* into abandoned and unabandoned parts would be both inconsistent with general maritime law and ill-advised, because it would mean that both a federal court and a state court might be adjudicating the issues concerning the fate of the *Brother Jonathan*. *Ibid*. That analysis is incorrect.

Nothing in the ASA forecloses a finding of partial abandonment. The Act defines "shipwreck" conjunctively to include the "vessel or wreck, its cargo, and other contents." 43 U.S.C. 2102(d). As we have explained, moreover, the Act has two principal aims: to preserve historic shipwrecks and their contents and to ensure appropriate management of shipwreck sites even when the State does not have title to the entire shipwreck. Congress entrusted the States with stewardship of those aims. As Representative Moody observed during congressional debates on the ASA, "[t]he States are better qualified to manage historic shipwrecks. Where admiralty courts focus on salvage interests, the States balance the interests of the salvager with the interests of the environment, historic preservation, and recreation. States are clearly in the best position to regulate and protect our irreplaceable historic and cultural artifacts." 134 Cong. Rec. 6619 (1988).

The cargo and personal possessions on board the *Brother Jonathan* are submerged cultural artifacts—every bit as important historically as the vessel itself (and typically of principal importance to the finder, for it is by recovering cargo that finders earn their name "treasure" salvors). Historic preservation is clearly served by allowing the State to take title to those artifacts that have rested at the bottom of the sea for over 130 years and were neither insured nor claimed by anyone. See *Columbus-America Discovery Group* v. *Atlantic Mut. Ins. Co.*, 974 F.2d 450, 465 & n.6 (4th Cir. 1992) (holding that "an abandonment may be found * * * as to any recovered parts of the ship, all passenger posses-

sions, and any cargo besides the insured shipments," since no party appeared to claim those items), cert. denied, 507 U.S. 1000 (1993). That approach is consistent with the ASA guidelines issued by the Secretary of the Interior. The guidelines provide that a vessel is not abandoned "when the owner of a sunken vessel is paid the *full* value of the vessel" by an underwriter. 55 Fed. Reg. 50,116-50,120 (1990) (emphasis added). Where full value has not been paid for an item of property (the vessel or a piece of its cargo), however, there is no reason to treat that property as unabandoned.

Recognition of partial abandonment also is consistent with the law of salvage, under which the saving of some or all of the cargo, apart from the ship, is a salvage service and therefore compensable. 3A *Benedict*, *supra*, § 23, at 2-16. That is the ancient rule of admiralty. See 3 J. Kent, *Commentaries on American Law* 245 (12th ed. 1873) (salvage is "compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger," etc.). There is no reason, in common sense or law, for considering the ship and its contents as a unified *res* not subject to partial abandonment. See *Stratton* v. *Jarvis*, 33 U.S. (8 Pet.) 4, 9-10 (1834) (property of several different owners on the vessel treated as distinct property under law of salvage); *Bemis* v. *RMS Lusitania*, 884 F. Supp. 1042 (E.D. Va. 1995) (hull, cargo and personal property distinct and may be salvaged independent of one another), aff'd, 99 F.3d 1129 (4th Cir. 1996), petition for cert. pending, No. 96-1448. If a wreck is only partially abandoned (and therefore only partially owned by the State), salvors would not thereby be authorized to recover the remainder in manner that is inconsistent with state regulations designed to ensure archaeologically and environmentally sound operations. Cf. *Idaho* v. *Coeur d'Alene Tribe*, 117 S. Ct.

2028, 2041 (1997) (title to submerged lands confers regulatory jurisdiction on the States); *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869) (even in law of salvage, skill of salvor is relevant in making an award).

Moreover, the "[r]ights of access" specified in the ASA itself declare a congressional policy for States to "develop appropriate and consistent policies so as to * * * allow for appropriate public and private sector recovery of shipwrecks." 43 U.S.C. 2103(a)(2). For shipwrecks that contain unabandoned property, a State may issue permits for the recovery of such property in a manner "consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites." 43 U.S.C. 2103(a)(2)(C). Upon recovery, the State may readily establish procedures for the return of any unabandoned property to its rightful owner.

3. After erroneously concluding that it could not find partial abandonment, the court of appeals compounded its mistake by ruling that the existence of some unabandoned property on the shipwreck required a finding that the entire vessel and its contents are unabandoned. "Because the law is reluctant to find abandonment, and because a finding of partial abandonment would deprive those holding title to the unabandoned portion of the wreck access to the federal forum," the court held, "the *Brother Jonathan* was not abandoned." Pet. App. A19 (citation omitted).

That concern is misplaced. As we have explained in point I, respondent is entitled to a federal forum, in this *in rem* proceeding, to determine title to the *Brother Jonathan* and its items of cargo. If the federal court finds that the vessel and certain of its cargo are abandoned (and meet the other conditions of the ASA), it will decree title of that property to the State. At that point, it is entirely appropriate that management of the State's

property would be turned over to state authorities,[28] and the ASA contemplates that States will set up their own policies and procedures to do so. It also is appropriate for state tribunals to determine the adequacy of those procedures, so long as they do not conflict with the exclusive *in rem* jurisdiction of the federal admiralty court.

The court of appeals' unified *res* rule of abandonment under the ASA, by contrast, would frustrate the purposes of the Act. If the court's analysis were correct, no shipwreck containing any property owned by the United States could ever be covered by the ASA (and thus would be subject in its entirety to the admiralty law of finds and salvage), because the United States does not abandon its property except by express renunciation of title.[29] The same would be true so long as it could be shown that some property on the vessel was, and continues to be, owned by someone (perhaps unknown) other than the State. Thus, as in this case, a subrogee of an insurance claim to a portion of the vessel's cargo would always be able to defeat a contention that the ASA applied to any other portion of the cargo or to the vessel itself. That result would upset the regulatory scheme envisioned by the ASA by creating an incentive for would-be finders in admiralty to frustrate the ASA's transfer of title to the State through the purchase, where possible, of insurers' rights.

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[28] Nothing in the ASA creates exclusive jurisdiction in federal courts over claims arising under the Act. Thus, a plaintiff could sue in state court for a declaration that the ASA did not apply. Such a suit would not have the advantage of an *in rem* decree against the whole world, but it would definitively resolve a State's claim to title under the ASA.

[29] See U.S. Const. Art. IV, § 3, Cl. 2. See generally *United States* v. *California*, 332 U.S. 19 (1947); *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 294 (1941); see also 41 C.F.R. 101-45.900 *et seq.* (agency determinations for abandonment of federal property).

C. Application Of The Appropriate Standard In This Case

With the foregoing principles in mind, the record compiled to date would support a finding that the *Brother Jonathan* itself was "abandoned" within the meaning of the ASA because of the time that has passed since the shipwreck (130 years) and the failure of any putative owner to claim title to the ship or to search for the property. The existence of claims by the United States and others to ownership of unabandoned property aboard the *Brother Jonathan* does not alter that result.

There is no evidence that the owner of the vessel has made any claim of ownership or any attempt to locate the vessel since the *Brother Jonathan* sank in 1865. Respondent asserts that insurance claims on the vessel were paid in 1865 and that the insurers' successors-in-interest have assigned their subrogation interests to it. A newspaper article introduced during the district court hearing (J.A. 138-145) lists insurance claims paid by five underwriters for losses aboard the vessel (Pet. App. A31 n.9), but there was no evidence that the ship itself was insured (*id.* at A4).[30] Given that there is no dispute that those subrogated claims involve only a portion of the cargo—leaving aside whether they are valid claims at all—there is no apparent basis for the court to deny petitioner's contention that the *Brother Jonathan* and most of her cargo were abandoned. A ruling for the State to that extent would permit the application of state procedures for the management of the site with due consideration of the in-

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[30] The district court decision states that five insurance companies paid claims totaling $48,490 and that approximately two-thirds of the cargo was uninsured. Pet. App. A21.

terests of the United States and respondent as the successor-in-interest to other property.[31]

III. THE ASA DOES NOT PREEMPT STATE STATUTES ASSERTING TITLE TO SHIPWRECKS ABANDONED IN STATE WATERS

If, as the record suggests, California is entitled to ownership of the *Brother Jonathan* and portions of its cargo under the ASA and to exercise its regulatory powers to ensure appropriate recovery of the unabandoned portions of the shipwreck, there would be no need to decide whether the ASA preempts Section 6313 of the California Public Resources Code (West Supp. 1997), as the court below held. A finding of abandonment under the ASA would render moot whether a provision of state law would also vest title in the *Brother Jonathan* in the State. The parties stipulated that the *Brother Jonathan* is located in state waters, and the vessel has been determined eligible for inclusion on the Historic Register since October 12, 1995. Accordingly, even if there is some doubt concerning whether the vessel is embedded, the *Brother Jonathan* would meet the standards of the ASA for transfer of title to the State: it is historic, abandoned, and in state waters. On the other hand, if the *Brother Jonathan* is definitively found on remand not to be abandoned within the meaning of the ASA, petitioners' reliance on the state statute would become significant.

The narrow preemption issue before this Court is whether Section 7(b) of the ASA, 43 U.S.C. 2106(b), pre-

[31] The existing record was developed in connection with petitioners' motion to dismiss on Eleventh Amendment grounds. Because the courts below properly denied that relief, the district court presumably must now decide in the first instance whether any further evidence should be received on abandonment or other issues going to the merits of petitioners' and respondents' claims.

empts Section 6313 of the California Public Resources Code[32] for shipwrecks not covered by the ASA. Section 7(b) provides that the ASA "shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies." 43 U.S.C. 2106(b). The court of appeals read that provision as a clear statement that "Congress intended to transfer title to the states only for shipwrecks that meet the requirements of the ASA," and that "[a]ll other shipwrecks continue to be

[32] Section 6313 of the California Public Resources Code (West Supp. 1997) provides, in pertinent part:

> (a) The title to all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California is vested in the state. All abandoned shipwrecks and all submerged archaeological sites and submerged historic resources of the state shall be in the custody and subject to the control of the commission for the benefit of the people of the state of California. * * *
>
> (b) As used in this section, "submerged archaeological site" and "submerged historic resource," shall be given the broadest possible meaning, to include any submerged object, structure, building, watercraft, or vessel and any associated cargo, armament, tackle, fixture, human remains, or remnant thereof, or any site, area, person, or place, which is historically or archaeologically significant, or significant in the prehistory or history o[f] exploration, settlement, engineering, commerce, militarism, recreation, or culture of California and which is partially or wholly embedded in or resting on state submerged or tidal lands.
>
> (c) Sites with archaeological or historic significance shall be determined by reference to their eligibility for inclusion in the National Register of Historic Places. Any submerged archaeological site or submerged historic resource remaining in state waters for more than 50 years shall be presumed to be archaeologically or historically significant. * * *

subject to the exclusive admiralty jurisdiction of the federal courts." Pet. App. A8. The court misread the Act.

Nothing in Section 7 of the ASA expresses an intent to preempt state statutes. Unlike other federal statutes that unequivocally occupy a certain regulatory field,[33] Section 7 operates in a quite different way. Section 7(a) merely states that the ASA's provisions apply only to certain abandoned shipwrecks that meet the Act's criteria. If a shipwreck meets those criteria, the ASA applies and other federal laws do not. If a shipwreck does *not* meet the ASA's criteria, however, Section 7(b) expresses an intent not to affect the operation of any *other* federal law—*e.g.*, the law of salvage and finds—with respect to such shipwrecks. In that event, it would become necessary to look to that other federal law to determine whether the state statute is preempted. The ASA would have no remaining preemptive force in its own right.[34]

Contrary to the court of appeals' belief, nothing in Section 7(b) states that "[a]ll other shipwrecks continue to be the subject of the exclusive admiralty jurisdiction of the federal courts." Pet. App. A8. Section 7(b) provides only that the ASA "shall not *change* the laws of the

[33] See, *e.g.*, 29 U.S.C. 1144 (employee benefit plan preemption clause); 15 U.S.C. 1334 (tobacco regulation); 15 U.S.C. 2617 (hazardous chemicals).

[34] Nothing in the ASA itself expresses an intent to occupy the field of shipwreck regulation or to preempt state law. To the contrary, the ASA obviously contemplates state ownership and management of abandoned, historic shipwrecks located within state waters. The House Report accompanying passage of the ASA makes clear that "the Committee intends that states should have title to historic and certain other abandoned shipwrecks in state waters, thereby eliminating the assumption that there is no owner of these wrecks. * * * [O]ur nation's maritime heritage * * * is best protected by states acting through their historic preservation programs consistent with federal guidance." H.R. Rep. No. 514, *supra*, Pt. 2, at 8.

United States relating to shipwrecks, other than those to which this chapter applies," 43 U.S.C. 2106(b) (emphasis added), without saying what the preemptive force of those (unchanged) laws is. The court apparently misunderstood the interrelationship between Section 7(a) and (b) of the ASA. Section 7(a) states that "[t]he law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies." 43 U.S.C. 2106(a). The court seemed to think that Section 7(b)'s savings clause was intended to ensure that "[t]he law of salvage and the law of finds shall * * * apply" to shipwrecks *not* covered by the Act. But Section 7(b) does not provide the inverse of Section 7(a). Instead, it simply expresses an intent not to change any laws of the United States except with respect to shipwrecks covered by the Act.

Whether any other "laws of the United States" may properly be found to preempt any applicable provision of California state law was not analyzed by the court below. That question is best left for determination in the first instance by the district court on remand. If the court concludes that the *Brother Jonathan* and certain of its cargo are covered by the ASA, title to that property will be confirmed in the State. The question of application of the state statute to that property would then never arise. If the district court determines that the property is not covered by the ASA, the court would retain its admiralty jurisdiction. At that point, the question whether any provisions of state law that petitioners invoke are preempted by federal admiralty law would be ripe for consideration in a concrete context.[35]

[35] Questions of preemption of state statutes by federal maritime law are often quite complex. As this Court has observed, "[i]t would be idle to pretend that the line separating permissible from impermissible

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted.

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state regulation is readily discernible in our admiralty jurisprudence." *American Dredging Co.* v. *Miller*, 510 U.S. 443, 452 (1994).